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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK VARGAS,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA CLARA,

Respondent,

CAROLYN R. BISSETT et al.,

Real Parties in Interest.

No. H033570
(Santa Clara County
Super.Ct.No. CV114112)

In this original proceeding, petitioner Mark Vargas seeks a writ of mandate directing the trial court to vacate its order sustaining without leave to amend real parties in interest Carolyn R. Bissett and Richard Treanor's[1] demurrer to three causes of action of Vargas's complaint. The first of these causes of action alleged a private right of action for Bissett's violation of the Solar Shade Control Act, Public Resources Code section 25980 et seq. (hereafter the Act), as it existed before 2008 statutory amendments (Stats.

[1] For ease of reference we collectively refer to real parties in interest as the singular "Bissett."

1978, ch. 1366, § 1, p. 4541).[2] The second cause of action pleaded what was labeled negligence per se and the third, nuisance per se with both of these claims also premised on Bissett's violation of the Act in its former iteration. But the nuisance-per-se claim was also based on Bissett's alleged violation of portions of the City of Sunnyvale Municipal Code. The trial court sustained without leave to amend Bissett's demurrer to these claims because, in the court's view, Vargas lacked standing to bring them, the Act not expressly providing for a private right of action.

Without determining the propriety of the court's rationale, we conclude that its ruling was largely correct for a different reason—the 2008 amendments to the Act eliminated the bases for Bissett's alleged liability under theories of relief based on Bissett's violation of the Act, effectively abating these particular claims under what is known as the "statutory repeal rule." But to the extent the third cause of action was also based on Bissett's alleged violation of the Sunnyvale Municipal Code concerning planting vegetation in a storm drain easement—a violation unrelated to the Act or any now repealed local solar ordinance—the sustaining of the demurrer without leave to amend was error. We accordingly grant in part Vargas's petition for writ relief.

## STATEMENT OF THE CASE

### I. *Vargas's Pleaded Causes of Action*[3]

Vargas's complaint was filed on June 4, 2008. It contained general allegations before alleging specific causes of action. These allegations included that since 1993, Vargas has been the owner of his property, located on Benton Street in the City of Santa Clara, and that since 1995, Bissett, as trustees of a trust, has owned the adjacent property

[2] Further statutory references are to the Public Resources Code unless otherwise specified.

[3] We are concerned here only with Vargas's first three causes of action. The other three pleaded causes of action were for common law nuisance existing by reason of the redwood tree roots, spite fence under Civil Code section 841.4, and declaratory relief.

on Benton Street, which is located in the City of Sunnyvale.[4] Bissett's property was previously owned by the Bissett Living Trust, which gifted it to them. Sometime between 1997 and 1998, Bissett, without a permit, planted eight redwood trees in a row in a storm drain easement on their property located just next to Vargas's property. When the trees were planted, they were approximately five to six feet in height.

In 2001, at a cost of $70,000, Vargas installed solar panels in his home under a permit to do so. The panels, which are alleged to be "solar collectors" under the Act (former § 25981), are located on the top of Vargas's deck trellis and on his roof.[5] They are directed to the south to receive maximum solar exposure and so placed, they face Bissett's redwood trees. When the panels were installed, the redwood trees ranged in height from five feet to 25 feet and did not yet impact the panels' access to sunlight. But the trees also had invasive root systems and because they were located in a storm drain easement, the root systems would likely interfere with drainage and run-off and have a negative impact on the easement and adjacent properties that it was intended to benefit.

Around the time that Vargas's solar panels were installed, he had a meeting with Bissett to discuss the trees, which, because of their rate of growth, would inevitably begin to affect his solar panels' access to sunlight. Vargas had been advised by the seller of the panels that state law would protect their access to sunlight from trees that grew to shade them by more than 10 percent between the hours of 10:00 a.m. and 2:00 p.m. Based on this understanding, Vargas requested Bissett to remove the trees and replace them with other privacy screening that would not block his solar panels, offering to pay for the

[4] For our purposes, we accept the pleaded facts, but not any pleaded contentions or legal conclusions, as true. We accordingly state the facts as pleaded without deciding their truth or establishing them as true going forward in the litigation.

[5] All allegations of the complaint refer to the Act as it existed before the 2008 amendments, which became effective January 1, 2009.

removal and replanting. Bissett declined this offer but indicated willingness to reconsider the issue if and when the trees grew to the point of shading the panels.

Based on these facts, Vargas alleged that Bissett's permitting the trees to remain and grow after the installation of his solar panels constituted a violation of the Act, which, prior to 2008 amendments provided in pertinent part that, "no person owning, or in control of a property shall allow a tree or shrub to be placed, or if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area upon that solar collector surface . . . at any one time" between 10:00 a.m. and 2:00 p.m. (former § 25982; see Stats. 1978, ch. 1366, § 1, p. 4542.) He further alleged that under former sections 25982 and 25983, any person who violated the Act after reasonable notice in writing was " 'guilty of a public nuisance' " and that on December 10, 2007, Bissett had been prosecuted by the District Attorney and convicted of violating these sections.[6]

In addition to violating the Act, Vargas pleaded that by allowing the trees to remain, Bissett was also in violation of Sunnyvale's Municipal Code section 19.56 et seq., which he alleged was known as the "Solar Access Ordinance." According to Vargas, this ordinance provides similar protections as the Act, stating that, " 'No person or entity owning or in control of real property shall allow any tree or shrub thereon to interfere with solar access to any rooftop or to any active solar collector located on a nearby or adjacent property' " and that a violation similarly constitutes a public nuisance under Sunnyvale Municipal Code section 19.56.030.[7] He further alleged that Bissett's

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[6] Such a violation was categorized as an infraction. (former § 25983; see (Stats. 1978, ch. 1366, § 1, p. 4542.)

[7] The current version of Sunnyvale Municipal Code section 19.56.030, enacted in 2009 by ordinance number 2904-09, does not contain this language. But it did appear in a former version of this section, which was enacted in 2006 by ordinance number 2808-

having planted the trees in the first place in a storm drain easement without a permit likewise violated the Sunnyvale Municipal Code section 13.08.360.

For his first cause of action, which he labeled "Violation of Public Resources Code Sections 25980 et seq.," Vargas alleged a private right of action for Bissett's violation of the Act by the failure "to trim or remove the trees blocking solar access to the Vargas Property." He claimed damages in the form of higher energy costs and loss of his $70,000 investment in the solar panels.

Vargas's second cause of action was labeled "Negligence Per Se—Violation of Public Resources Code Sections 25980 et seq." It pleaded that Bissett's violation of the Act, as established by their 2007 conviction for it, constituted negligence per se in that Vargas was a member of a class of persons the Act was designed to protect. As was also pleaded in Vargas's first cause of action, Bissett's violation of the Act caused him damage in the form of higher energy costs and loss of his initial investment. And the court-ordered mitigation as a result of Bissett's conviction for violating the Act was "limited and ambiguous" and "inadequate to address the harm on an ongoing basis without multiple prosecutions."

The third cause of action of Vargas's complaint was labeled "Nuisance Per Se." It alleged that Bissett's violation of both the Act and the Sunnyvale Municipal Code constituted nuisance per se, entitling Vargas to money damages for lost use and enjoyment of his property, discomfort, annoyance, and mental and emotional distress.

As pertinent here, Vargas's prayer requested an injunction requiring Bissett to comply with the Act and to specifically "either remove the trees or maintain the height of all vegetation on the property, on an ongoing basis, at a level that will not cast shadow over" Vargas's panels, and compensatory and punitive damages.

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06 but deleted in its entirety in October 2008 by ordinance number 2875-08 in the wake of the 2008 legislative amendments to the Act.

II. *Bissett's Demurrer*

Bissett demurred to Vargas's complaint. Stated grounds for the demurrer as to the first three causes of action included that the "person who filed the pleading does not have the legal capacity to sue" under Code of Civil Procedure section 430.10, subdivision (b) and that the pleading did not state facts sufficient to constitute a cause of action under Code of Civil Procedure section 430.10, subdivision (e). In their memorandum of points and authorities, Bissett argued that recent 2008 amendments to the Act, of which they requested judicial notice, resulted in the failure of the first three claims to state facts sufficient to constitute a cause of action and that Vargas in any event lacked standing under the Act to bring these claims. Bissett also contended that with respect to the third cause of action labeled nuisance per se, the provisions of the Sunnyvale Municipal Code were enforceable only by the City of Sunnyvale.

Vargas responded that his complaint was validly brought under the former version of the Act and that the 2008 amendments to the Act did not affect his claims, which were brought before those legislative changes, because the amendments were not expressly declared to be retroactive. He contended that the former version of the Act was applicable and that it provided a private right of action through which he could maintain his claims. He further contended that the Sunnyvale Municipal Code furnished an additional basis for his nuisance-per-se claim.

III. *The Court's Order*

After the parties submitted the matter, the court announced from the bench that it was sustaining Bissett's demurrer to Vargas's first, second, and third causes of action without leave to amend.[8] Vargas's counsel inquired as to the basis of the ruling and the court responded that Vargas lacked standing to bring these claims under the former

[8] The demurrer was overruled as to the fourth, fifth, and sixth causes of action but that is not relevant here.

version of the Act because it did not contain a provision allowing a private right of action.[9]

The court's written order reflected its oral ruling, stating, Bissett's "demurrer to the first, second, and third causes of action, based upon lack of standing, is sustained without leave to amend. Whether a statute gives rise to a private right of action is a question of legislative intent. Where, as here, the Legislature did not express an intent to provide a private right of action, there is none. It is well settled in California that, in the absence of an express grant or covenant, a landowner has no easement for light and air over adjoining land and, except in cases where malice is the overriding motive, blockage of light to a neighbor's property does not constitute actionable nuisance. [See *Sher v. Leiderman* (1986) 181 Cal.App.3d 867, 875.]" The court's ruling did not specifically address the portions of the Sunnyvale Municipal Code that Bissett was alleged to have violated, giving rise to liability for nuisance per se. But the rationale for its ruling based on lack of standing presumably applied with equal force nonetheless.

## DISCUSSION

### I. *Availability of Writ Relief and Standard of Review*

Where, as here, the court has sustained a demurrer to only one of several causes of action, its order is not appealable. But immediate writ review may lie to "prevent a needless and expensive trial" on the remaining causes of action, which may be followed by reversal of the demurrer ruling and retrial. (*Coulter v. Superior Court* (1978) 21 Cal.3d 144, 148, superseded by statute on another ground as stated in *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 cal.App.4th 398, 412-413, fn. 6; see also *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367 ["Avoiding an

[9] Vargas's counsel also requested leave to amend the complaint. The court did not make an express ruling on this request but in effect denied it by stating that the pleading could not be amended to create standing where none existed as to the three causes of action.

unnecessary trial . . . militate(s) toward writ review"].) Writ review may also lie in this circumstance where a party has been deprived "of [an opportunity to plead] a substantial portion of the case." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223.)

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, we review the order de novo. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) On review of an order sustaining a demurrer, " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82.) We will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Accordingly, "we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist*. (1997) 54 Cal.App.4th 750, 757.)

"Review by mandamus is the appropriate way to control judicial discretion where that discretion has been abused. [Citation.] We thus consider de novo whether the trial court's ruling has deprived [plaintiff] of the opportunity to plead a cause of action. If it has, [the court] has abused its discretion. [Citation.] Abuse of discretion exists when the trial court has committed substantial error which is clearly prejudicial. Such prejudicial error is present when a court improperly prevents a party from pleading a substantial part of its case. [Citation.] Under such circumstances, relief by mandamus is appropriate

‘ “to prevent a needless and expensive trial and reversal.” [Citation.].’ [Citation.]” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 773.)

## II. *The 2008 Amendments to the Act Eliminated Bissett's Potential For Liability Under Theories Based on the Act*

### A. *The Relevant Statutory Amendments*

As noted, the Legislature made changes to the Act in 2008, effective January 2009.[10] (Stats 2008, ch. 176, § 1.) As relevant here, section 25984 was amended in pertinent part to state that the Act did not apply to, among other things, "[a] tree or shrub planted *prior to* the installation of a solar collector." (§ 25984, subd. (a), italics added.) Section 25982 was also amended such that its provisions became applicable only to the placement or growth of trees or shrubs casting shadows "[*a]fter* the installation of a solar collector." (Italics added.) According to the Legislative Digest, the 2008 changes would "exempt trees and shrubs planted prior to the time of the installation of a solar collector, trees and shrubs that are subject to a local ordinance, or the replacement of trees or shrubs that have been growing before the installation of a solar collector and that are subsequently removed for the protection of public health, safety, or the environment." (Legis. Counsel's Dig., Sen. Bill No. 1399 (2008 Reg. Sess.) Stats. 2008, ch. 176, par. 2.)[11]

The other relevant change to the Act brought by the 2008 amendments was the repeal of those parts of former section 25983 that had characterized a violation of the Act as a public nuisance under Civil Code section 3480, an infraction that the district attorney or city attorney, as applicable, had a duty to prosecute. Section 25983 now provides that

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[10] According to the parties, these amendments were prompted by their particular dispute. They agree that under the amended version of the Act, Bissett's allowing the trees to grow unrestrained does not constitute a violation as the trees were installed *before* Vargas's solar panels and are therefore exempt from the Act's reach.

[11] We sua sponte take judicial notice of this document.

a violation of the Act is instead a private nuisance, as defined in Civil Code section 3481. In other words, a violation of the Act is no longer a public offense or criminal violation and it no longer has any public component. A violation now constitutes no more than a private nuisance, a claim that would be litigated only through a civil action. (§ 25983.)

The 2008 amendments to the Act contain no expression as to their retroactive application. But nor do they include a savings clause. If, as a result of this latter omission, they are applicable to the instant dispute, they would have eliminated the Act as a basis for Bissett's liability to plaintiff with respect to any of the three subject causes of action. This is primarily because the Act now exempts from its application a tree or shrub planted before the installation of the affected solar collector, as Bissett's trees were here.

B. *The Amendments Have Eliminated the Act as a Basis For Any Civil Liability in This Case*

The trial court sustained Bissett's demurrer to the three causes of action on the basis of lack of standing, concluding that the Act contained no direct, private right of action for its violation and extending that reasoning to the negligence per se and nuisance per se claims premised on Bissett's violation of the Act. The parties' briefing in this proceeding accordingly addressed only this issue. But we perceive an even more fundamental question: Even if Vargas had standing to assert his claims under the former version of the Act, did the 2008 amendments eliminate the Act as a basis for Bissett's liability such that the demurrer to the three causes of action (to the extent the claims are based on the Act) was well taken?[12] Our answer is yes.

As Vargas points out, "It is a widely recognized legal principle . . . that in the absence of a clear legislative intent to the contrary[,] statutory enactments apply

[12] We requested and received supplemental briefing from the parties on this question and have therefore complied with Government Code section 68081.

prospectively." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194 (*Evangelatos*); Code Civ. Proc., § 3; see also *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393.) In other words, there is generally a presumption that statutory enactments do not apply retroactively unless there is clear legislative intent that they will. (*Evangelatos, supra,* 44 Cal.3d at p. 1208.)

A retroactive or retrospective law is one affecting rights, obligations, acts, transactions, and conditions that are performed or exist before the adoption of the statute. It is one that " ' "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." ' " (*Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839; *Evangelatos, supra*, 44 Cal.3d at pp. 1193-1194; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1197 (*Amaral*.) Phrased another way, a retroactive statute is one that " 'operates to "increase a party's liability for past conduct." ' " (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1105.) It is a new provision that attaches new legal consequences to events completed before its enactment by imposing broader legal duties, expanded liability, or increased punishment. (*Amaral, supra*, 163 Cal.App.4th at pp. 1198-1199.)

Although at the outset, the principle against retroactivity might seem clear enough, as applied, it sometimes requires deeper analysis to ascertain whether application of a new or amended statute is actually retroactive in effect in a particular case. Quoting the United States Supreme Court, the California Supreme Court recently observed that " ' "deciding when a statute operates 'retroactively' is not always a simple or mechanical task" (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268) and "comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event" (*id.* at p. 270). . . ." (*Ibid.*)' ([*People v. Grant* (1999) 20 Cal.4th 150, 157].)" (*In re E.J.* (2010) 47 Cal.4th 1258, 1273.)

In an attempt to distinguish retrospective and prospective statutes, courts have sometimes used a distinction based on substantive versus procedural effect. Those statutory changes affecting substantive rights by the imposition of new, additional, or different liabilities based on past conduct are generally not applied if to do so would have a retroactive effect. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-291; *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 688 (*Brenton*).) In contrast, applying changed procedural statutes to the conduct of existing litigation does not constitute retroactive application, "even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute." (*Id*. at p. 689.) This is instead prospective application because the statute relates to the procedure to be followed in the future. (*Ibid*; *Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.) For this reason, " ' "it is a misnomer to designate [such statutes] as having retrospective effect." [Citation.]' ([*Ibid*].)" (*Brenton, supra*, 116 Cal.App.4th at p. 689; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 926.) In other words, " ' "procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial post-dates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action." ' " (*Brenton, supra,* 116 Cal.App.4th at p. 689.) Thus, in this circumstance, application of the statute is not an exception to the general rule against retroactivity but rather a prospective application of the law.

When ascertaining if a statute has retroactive application, "[i]t is the effect of the law, not its form or label" as substantive or procedural that is important. (*Brenton, supra*, 116 Cal.App.4th at p. 689; *City of Monte Sereno v. Padgett* (2007) 149 Cal.App.4th 1530, 1538-1539. " '[W]hat is determinative is the effect that application of the statute would have on substantive rights and liabilities,' "—whether it would impose new, additional, or greater burdens based on past conduct (*Brenton, supra,* 116 Cal.App.4th at p. 689*; Elsner v. Uveges, supra,* 34 Cal.4th at pp. 926-927) or substantially affect existing

rights and obligations (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d at p. 395; *Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 231) as opposed to merely regulating future conduct in the disposition of claims that arise from past events.

And even if a statute would have a disfavored retroactive effect so as to impair a vested right, it can be so applied nonetheless in accordance with legislative intent if to do so does not offend constitutional considerations. The "retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract. [Citations.]" (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756, superseded by statute on another ground as stated in *In re Marriage of Heikes* (1995) 10 Cal.4th 1211, 1219-1220.) Concerning due process, as we are not here concerned with criminal liability or contract, vested rights cannot be substantively impaired without sufficient justification or in an arbitrary or irrational manner. " 'In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of retroactive application of the law to the effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.' (*In re Marriage of Bouquet* [(1976)] 16 Cal.3d [583, 592].)" (*Bouley II v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 610.) And it is settled that the "state, exercising its police power, may impair [vested] rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people." (*In re Marriage of Buol*, *supra*, 39 Cal.3d at pp. 760-761.)

Apart from the question whether application of a new or amended statute would have retroactive or prospective effect, and as we observed in *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1023 (*Zipperer*) where we also dealt with provisions

of the Act, the principle that statutes generally do not apply retroactively has a correlate—the statutory repeal rule. " 'Although the courts normally construe statutes to operate prospectively, [they] correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, "a repeal of such a statute without a saving clause will terminate all pending actions based thereon." ' [Citation.] (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 [(*Mann*)].) In other words, where 'the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retroactivity concerns . . . .' (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 690.)" (*Zipperer, supra*, 133 Cal.App.4th at p. 1023.)

This common law rule is now codified at Government Code section 9606, which provides that "[a]ny statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." Because of this section, the ordinary presumption against retroactive application does not apply when a statutory enactment repeals a statute that provided a purely statutory cause of action. In that instance, the enactment takes immediate effect in all pending cases in which a judgment is not final unless the enactment contains a saving clause. (*Mann, supra,* 18 Cal.3d at p. 829.)

The Supreme Court long ago explained this rule and its operation in *Callet v. Alioto* (1930) 210 Cal. 65. There, the court said that notwithstanding the general rule against retroactive application of a statute, "It is also a general rule . . . that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. [Citations.] The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time. ([Gov. Code, § 9606].) [¶] This rule only applies when the right in question is a statutory right

and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action." (*Callet, supra,* 210 Cal. at pp. 67-68; see also *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.) But where a right is merely statutory, it is not considered vested, in the way that we sometimes characterize rights that derive from the common law, until final judgment, meaning one beyond appeal. (*Younger v. Superior Court, supra*, 21 Cal.3d at p. 109*; Yoshika v. Superior Court* (1997) 58 Cal.App.4th 972, 981-982.) A statutory right remains inchoate and unvested until reduced to final judgment. Because "it is a creature of statute, the right of action exists only so far and in favor of such person as the legislative power may declare. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 575[, overruled on another ground as stated in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 168-171].)" (*Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1007 (*Graczyk*).) In the absence of a saving clause, a repealing statute destroys the inchoate right unless it has been reduced to final judgment. (*Id.* at pp. 1006-1007.) Upon this extinguishing event, the right previously afforded is abated. (*Rankin v. Longs Drug Stores California, Inc.* (2009) 169 Cal.App.4th 1246, 1255-1257 (*Rankin*).)

Thus, like the prospective application of a statute, the statutory repeal rule is not an exception to the general rule against retroactive application of the law. It is instead a recognition that that general rule applies only to vested rights that derive from the common law as opposed to those that are purely statutory. This principle was illustrated in *Mann, supra*, 18 Cal.3d 819, in which a school district sought and received from the trial court a determination that a teacher's marijuana conviction provided statutory grounds for his dismissal. But, "while the judgment in the school district's favor was on appeal, the Legislature eliminated that conviction as a statutory basis for dismissal, and

the Supreme Court concluded the school district's action should be abated. (*Id.* at pp. 829-831.)" (*Rankin, supra*, 169 Cal.App.4th at pp. 1256-1257.) The reviewing court was obliged to dispose of the case under the law in effect when its decision was rendered by reversal of the judgment, as the purely statutory right that had given rise to it no longer existed. (*Mann, supra*, 18 Cal.3d at pp. 822-823, 826-831.) The court observed, "The school district's authority to dismiss defendant rests solely on statutory grounds, and thus under the settled common law rule[,] the repeal of the district's statutory authority necessarily defeats this action which was pending at the time the repeal became effective." (*Mann, supra*, 18 Cal.3d at pp. 830-831.)

The statutory repeal rule is also illustrated in *Graczyk, supra*, 184 Cal.App.3d 997. There, the appellate court held that because an applicant in a workers' compensation case has no vested right to his status as an employee at the time of injury, a statutory change limiting the definition of "employee" under the workers' compensation law was properly applied with retroactive effect, eliminating the applicant's claim. As a creature of statute, the applicant's pending right of action was subject to legislative extinction, even though the injury happened in the past. (*Id.* at p. 1007.)

As noted, we applied the statutory repeal rule in *Zipperer*, which also concerned the Act. There, defendant County of Santa Clara had exempted itself by ordinance from the Act's provisions, consistently with section 25985—the Act's exemption provision. The plaintiffs contended that the exempting ordinance could not be applied retroactively so as to defeat their preexisting damage claims. (*Zipperer, supra*, 133 Cal.App.4th at p. 1022.) But because rights under the Act were purely statutory, as Vargas concedes here, we rejected this contention and concluded, based on the statutory repeal rule, that the plaintiffs' cause of action premised on the Act was eliminated by the later-enacted ordinance exempting the County from the Act. (*Id.* at pp. 1023-1025.) In doing so, we considered four factors: "the statutory nature of the plaintiffs' claim; the unvested nature of plaintiffs' claimed rights; the timing of the elimination of those rights; and the nature

of the mechanism by which the right of action was eliminated." (*Id.* at p. 1023.) Analyzing these factors here, we come to the same conclusion.

First, as noted, Vargas concedes that his claim for violation of the Act is a purely statutory claim. (*Zipperer*, *supra*, 133 Cal.App.4th at pp. 1023-1024.) He also acknowledges that to the extent his claims for negligence per se and nuisance per se are likewise premised on this alleged violation, they derive from statute.[13] Notwithstanding

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[13] The first cause of action assumes that the Act includes provision for a private right of action based on its violation. The trial court here concluded that it did no such thing. Generally, a statutory violation does not give rise to a private right of action unless the Legislature expressly provides for a private remedy. "[A] private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature *intended* to create such a right to sue for damages. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 62.) If the Legislature intends to create a private cause of action, the court must generally assume it will do so " ' "directly[,] . . . in clear, understandable, unmistakable terms." ' " (*Id.* at p. pp. 62-63; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 295, 300, 304-305; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850; accord *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 400.) Here, because of our disposition, we need not and do not decide whether the Act affords a private right of action as pleaded in Vargas's first cause of action.

But we do observe, contrary to the lower court's conclusion that the existence of a private right of action in that claim is not necessary to proceed on claims labeled negligence per se and nuisance per se based on alleged violations of the Act. These latter claims involve the use of statutes to establish the elements of what in essence are traditional causes of action. (*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 141, 145.) In such a case, the statute does not create a new private right to sue. The statute instead serves the subsidiary function of providing evidence to establish a duty or standard of care as elements of the claim—a different matter from a statute creating a wholly new right to sue. (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1284-1286 [discussing negligence per se as evidentiary doctrine, not as private right of action for violation of a statute]; Evid. Code, § 669.) To proceed on a theory of negligence per se is simply to invoke the principle that statutes and regulations may be used to establish duties and standards of care by presumption in a negligence action in which both a duty and breach of a standard of care must be proven along with causation and damages. Similarly, to proceed on a theory of nuisance per se is to invoke the rule that a public or private nuisance (Civ. Code, §§ 3479, 3480) may be established by

this acknowledged statutory character or basis of his claims, Vargas contends that he has obtained a vested right. This, he asserts, precludes application of the statutory repeal rule here because his right has gone beyond being inchoate, incomplete, or unperfected by virtue of Bissett's criminal conviction for violating the Act and his financial investment in his solar system in reliance on existing law, affording him a vested property right.

But Vargas confuses the right at issue here. His private right of action for relief against Bissett that he is pursuing in this case was not ipso facto established or perfected by Bissett's previous conviction, characterized as an infraction, for violating the Act in a separate case. His alleged statutory private right of action against Bissett would not vest until final judgment in this case. And by virtue of Government Code section 9606, Vargas was not entitled to rely on any previously existing statute providing him a right or remedy not afforded at common law. " ' "[A]ll statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." ' " (*Zipperer, supra*, 133 Cal.App.4th at p. 1023, quoting *Mann, supra*, 18 Cal.3d at p. 829.) At this point before final judgment in this case, Vargas possesses " 'no right or remedy . . . which existed apart from the statute itself and which the legislature could not cut off by repeal.' [Citation.]" (*Zipperer, supra*, 133 Cal.App.4th at p. 1024.) " ' "No person has a vested right in an unenforced statutory penalty or forfeiture." ' [Citations.] Until it

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demonstrating that a " 'legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. . . . [T]o rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law.' [Citation.] '[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made.' [Citation.] ' " Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance." [Citations.]' [Citation.]" (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163-1164; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1206-1207.)

is fully enforced, a statutory remedy remains merely an ' "inchoate, incomplete, and unperfected" ' right, which is subject to legislative abolition. [Citation.]" (*Zipperer, supra,* 133 Cal.App.4th at p. 1024.) And while Vargas may have a vested property right in his solar system by virtue of his substantial financial investment in a permitted improvement, this is not the same right as his claimed right of action to obtain relief against Bissett.

We proceed to the third factor, timing. As in *Zipperer*, if the statutory right has been eliminated by legislative act before judgment is final, the legislative act " 'destroys the right of action,' " wiping out the cause of action because it has not yet merged into a final judgment. (*Zipperer, supra,* 133 Cal.App.4th at p. 1024.) Vargas attempts to distinguish *Zipperer* on the basis that he filed his complaint in this case before the law changed and after Bissett's criminal conviction. But the time the complaint was filed does not save the cause of action, which can be eliminated by statutory repeal until final judgment, even after a judgment has been entered but is on appeal. (*Ibid*.) And again, it is not the status of the final judgment of conviction against Bissett in the separate criminal action that is determinative for this purpose. It is instead the status of this action in which Vargas is seeking relief against Bissett through his statutory claim and other claims based on violation of the Act. Here, the repeal affected these claims before any judgment could be entered. Thus, the timing factor in the determination whether his claims are extinguished is not in his favor.

The fourth factor is the legislative mechanism by which the right of action was abolished. "Typically, that mechanism is repeal or amendment of the remedial statute. (See, e.g. [*Brenton, supra*,] 116 Cal.App.4th at p. 690.) But we know of no rule of law that limits the Legislature to those methods. To the contrary, as our high court has observed, even where 'the words of the . . . statute are not expressly words of repeal without a saving clause, . . . the effect is the same in so far as application of the principles is concerned when the legislature by apt expression has withdrawn the right and remedy

in particular cases, including all pending actions based thereon.' [Citation.] The critical point is that 'the legislature may take away the right of action itself. [Citation.] Our high court has alluded to the Legislature's 'power to enact a statute which would cut off the right theretofore accorded the plaintiff . . . .' [Citation.] It also has spoken of the Legislature's power to 'withdraw' a statutory right or remedy. [Citations.] As noted . . . , we look to the substance of the legislation—not its label—to determine whether it operates as a repeal. [Citation.] The pivotal issue is whether the legislation constitutes 'a substantial reversal of legislative policy' that represents 'the adoption of an entirely new philosophy' vis-à-vis the prior enactment. [Citation.]" (*Zipperer, supra,* 133 Cal.App.4th at pp. 1024-1025.)

Here, Vargas acknowledges that the decriminalization of the Act and its amendment changing the character of a violation from a public nuisance to a private nuisance are amendments that presently operate. But he contends that the change exempting trees planted before the installation of a solar collector is a substantive change that cannot be applied retroactively without violating the principle against retroactive application expressed in *Evangelatos, supra*, 44 Cal.3d 1188. Vargas's argument is misplaced. The question for purposes of the statutory repeal rule is not whether a repeal constitutes a substantive change. As we have explained, the rule applies to statutory rights and remedies as distinguished from those derived from the common law. The statutory change analyzed in *Evangelatos* "modified the traditional, common law 'joint and several liability' doctrine" (*Evangelatos, supra,* at p. 1192) and thus affected vested rights derived from the common law, though later codified. *Evangelatos* was not therefore concerned with the repeal of a purely statutory right or remedy and the statutory repeal rule, as we are here. Moreover, contrary to Vargas's argument, whether a statutory change is substantive or procedural is not related to the question we ask when analyzing the legislative mechanism by which the statutory right was abolished.

Concerning the 2008 legislative exemption from the Act for trees planted before the installation of a solar collector, this clearly did represent a reversal of legislative policy that had previously been construed to include all trees and vegetation regardless of the time of planting in relation to the installation of a solar collector. This change expresses a policy preference for pre-existing trees that was previously absent. Such a change effectively operates as a repeal because the Legislature has significantly narrowed the scope of the Act so as to exclude previously accorded rights and remedies available under it, thus withdrawing those particular rights and remedies. We accordingly conclude that the 2008 amendments to the Act constituted a valid method of extinguishing by repeal any statutory claim Vargas previously had under the Act. This rationale extends to Vargas's claims for negligence per se and nuisance per se to the extent that these claims are premised on the same alleged statutory violation.[14]

In sum, Vargas's statutory claim and those that strictly derive from Bissett's violation of the former version of the Act were abolished by the 2008 amendments to the Act. Vargas enjoyed no vested rights in these claims, which were not pursued to final judgment in this action when the legislative changes took effect. The amendments operated as a form of repeal of statutory claims under the Act that arose from trees planted before the installation of a solar collector, as happened here. Accordingly, the statutory repeal rule applies to eliminate Vargas's claims that are the subject of this

[14] Vargas conceded at oral argument that his second cause of action for negligence per se is entirely "derivative" of his first cause of action for violation of the Act because it similarly pleads only Bissett's violation of the Act as the basis for liability. He also pointed out that though his third cause of action for nuisance per se is likewise premised on Bissett's alleged violation of the Act, it is also based on their alleged violation of repealed portions of the Sunnyvale Municipal Code that mirrored the Act. And for the first time, he also asserted that this cause of action is premised, in addition, on Bissett's violation of Sunnyvale Municipal Code section 13.08.360 by their having planted the trees in the first place in a storm drain easement without a permit.

original proceeding and that are entirely premised on Bissett's violation of the former version of the Act. These circumstances do not implicate the general principle against retroactive application, which is thus not violated by our conclusion.[15] Thus, the trial court's sustaining of Bissett's demurrer to Vargas's first cause of action for violation of the Act and his second cause of action for negligence per se based strictly on Bissett's alleged violation of the Act, was correct, albeit for a different reason than lack of standing.

III. *The Third Cause of Action Labeled Nuisance Per Se Pleaded An Additional Basis for Liability Such That This Cause of Action Survives A General Demurrer*

As noted, Vargas's third cause of action for nuisance per se alleged Bissett's liability based on their violation of the Act and the now repealed local municipal code sections that paralleled the Act—claims that would be eliminated or abated as a matter of law by the statutory repeal rule. But the allegations of the claim also loosely referenced Bissett's alleged violation of Sunnyvale Municipal Code section 13.08.360 concerning the planting of vegetation in a storm drain easement without a permit as an additional

[15] At oral argument, Vargas also for the first time cited *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764 (*Morris*) for the proposition that with respect to the use of statutes to establish a standard of care, a statutory change will not be applied retroactively and the rules of negligence per se in place at the time of the accident or occurrence govern the establishment of liability. But we observe that in *Morris*, the statutory change involved was not the repeal of a statutory right or remedy invoking the statutory repeal rule as it is here. Moreover, unlike here, the particular statutory amendment there would have made the burden or liability on the defendant more onerous, which is the result that the prohibition against retroactive application is intended to avoid. (*Id.* at pp. 768-769 [*defendant* had a substantive right to have the case tried under the rules of negligence per se applicable at the time of the accident]; see also *Elsner v. Uveges, supra*, 34 Cal.4th at p. 928 [jury instructions reflecting post-accident rules permitting use of Cal-OSHA provisions to establish standard of care and breach of duty could not be used to retroactively increase liability *against defendant* for past conduct].) Accordingly, we do not view either *Morris* or *Elsner* as displacing the statutory repeal rule or dictating a different result here.

basis for per se liability. Concerning this claim, Bissett argued below that this municipal code provision is enforceable only by the City of Sunnyvale and therefore that Vargas lacked standing to assert their alleged violation of the provision as the basis for nuisance per se liability. The trial court's ruling sustaining Bissett's demurrer to this cause of action eliminated the entire cause of action.

But as we have observed, a claim for nuisance in which per se liability is alleged based on the violation of a statute does not depend on the particular statute providing for or creating a private right of action. Instead, the statute serves a subsidiary function of providing the evidentiary basis for the per se establishment of an element of the cause of action—that the subject activity or circumstance constitutes a nuisance. (*City of Claremont v. Kruse, supra*, 177 Cal.App.4th at pp. 1163-1164; *Beck Development Co. v. Southern Pacific Transportation Co, supra,* 44 Cal.App.4th at pp. 1206-1207.) Accordingly, the viability of Vargas's nuisance per se claim does not turn on the question whether the particular local ordinance alleged to have been violated is itself enforceable by a party other than the City of Sunnyvale. In other words, the issue of standing to sue under the ordinance based on the existence of a private right of action is irrelevant to the merits of Vargas's nuisance per se claim. The trial court's ruling sustaining Bissett's demurrer to the third cause of action was therefore an erroneous result.

To the extent Vargas's cause of action for nuisance per se is premised on the former version of the Act or Sunnyvale's repealed Solar Access Ordinance, it must fail on the merits as a matter of law based on the statutory repeal rule. But a general demurrer to a cause of action should be overruled if the plaintiff has stated a cause of action under any possible legal theory by " 'alleg[ing] sufficient facts to justify any relief, notwithstanding superfluous allegations or claims for unjustified relief. [Citations.] "[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice [between] the parties. (Code Civ. Proc., § 452.)" ' " (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th

1356, 1371; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 870.) Because Vargas's third cause of action for nuisance per se alleges the violation of a local ordinance that has not been repealed and that is not premised on the Act—section 13.08.360 concerning the planting of vegetation in a storm drain easement without a permit—Vargas has stated a cause of action under a possible theory of relief and the general demurrer to the cause of action should have been overruled. Vargas has thus been deprived of an opportunity to plead a substantial portion of his case with respect to this cause of action and to this limited extent, we grant his requested writ relief.

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent court to vacate its order sustaining Bissett's demurrer to the first, second, and third causes of action of Vargas's complaint without leave to amend and enter a new and different order sustaining the demurrer without leave to amend as to the first and second causes of action but overruling the demurrer as to the third cause of action. Each party to bear its own costs in this original proceeding.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.